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IN THE

Supreme Court of the United States

October Term, 1963

No. 987

PRADO OIL AND GAS COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY,

Respondents.

MEMORANDUM REPLY TO BRIEFS FILED BY RESPONDENTS

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Petitioner, PRADO OIL AND GAS COMPANY, submits the following memorandum reply to the briefs filed by the Federal Power Commission, the Public Service Commission of the State of New York and Long Island Lighting Company et al.[1]

[1] These briefs are permeated with arguments and assertions more appropriately discussed in briefs on the merits. Petitioner's silence with respect to these matters does not indicate acquiescense.

1.

Subsequent to the filing of the Petition for Certiorari in this case, the Fifth Circuit has recognized the conflict between the decision of the court below and the decision of the Tenth Circuit in *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404. On May 28, 1964, the Fifth Circuit issued its decision in *Hunt Oil Co. et al* v. *FPC* (Nos. 19,218 et al[2]), holding, *inter alia*, that the Federal Power Commission had authority to issue temporary certificates subject to a condition requiring the producers to refund any amounts collected in excess of the amount determined to be required by the public convenience and necessity in the final permanent certificate order. In agreeing with the holding of the court below, Judge Skelly Wright,[3] speaking for the Fifth Circuit, stated:

> "With reference to the refund condition, the United States Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Fahy, has approved this refund condition on a temporary authority. *Public Service Com'n of State of N.Y.* v. *Federal Power Com'n*, D.C. Cir., 329 F. 2d 242 (1964). It is true that the Tenth Circuit, in *Sunray Mid-Continent Oil Co.* v. *Federal Power Com'n*, 10 Cir., 270 F. 2d 404 (1959), apparently has held to the contrary.[4] In addition to the rejection of *Sunray* by the District of Columbia court, however, this court, in *Texaco, Inc.* v. *Federal Power Commission*, 5 Cir., 290 F. 2d 149, 156-157 (1961), has expressly reserved opinion as to 'whether the powers of the Commission respect-

[2] This decision is not yet reported. Because of the shortness of time, Petitioner was unable to have it printed as an appendix to this Reply Brief. In this connection, Petitioner was informed by the Clerk's office that this Reply had to be filed by June 3 in order to be considered by the Court.

[3] Sitting by designation.

ing the imposition of such a condition in the grant of a temporary certificate are as circumscribed as determined by the Court of Appeals for the Tenth Circuit."

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[*] "Actually, *Sunray* is factually not in point. There, unlike here, the producer had not yet dedicated its gas to the interstate market. Where operation had commenced under a temporary authorization, the Tenth Circuit in the same case dismissed a petition to review its conditions. 270 F. 2d at 407."

2.

The primary question presented to the Court concerns the authority of the Federal Power Commission under Section 7(c) of the Natural Gas Act to require producers to refunds amounts previously collected pursuant to unconditional temporary certificates. The Commission recognizes the importance of this question and states that "The decision below appears to be inconsistent with the reasoning of the Tenth Circuit in *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 270 F. 2d 404, 407-410" (Br., p. 9). However, the Commission argues that review is premature at the present stage of the proceedings, contending that after hearings on remand it may conclude that refunds are inappropriate,[1] or that if refunds are ordered Petitioner will still be in a position to challenge the Commission's power by a subsequent appeal (Br., pp. 10-11).

Petitioner submits that the Commision's recommended procrastination is inconsistent with sound judicial administration. The question of the Commision's power to award refunds is of vital importance to the entire natural gas industry. If Petitioner prevails, then the expense, time

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[1] New York and Long Island et al evidently do not agree with the Commission since they argue that the practical effect of the decision below is that refunds are mandatory.

and effort incident to further proceedings ordered by the court below will be avoided. The same is true as to cases now pending before the Commission involving the same issue. See Opinion No. 422, *Amerada Petroleum Corporation, et al*, Docket Nos. CI62-1544, *et al*, where the Commission is considering the refund question with respect to 35 consolidated certificate applications.[5] Further, it is imperative that the Court remove the existing uncertainty[6] as to the status of amounts now being collected by other producers pursuant to unconditional temporary certificates and provide guidance to those who are contemplating commitment of their gas to the interstate market under temporary certificates. Deferral of a decision in this case will only delay and not resolve the admittedly important question of the Commission's power to award refunds.

3.

New York concludes that certiorari on the refund issue is "both appropriate and desirable" (Br., p. 14). However, contrary to Rule 23(1)(c) New York attempts to smuggle into the case an entirely new question concerning the *duty* of the Commission to award refunds. The court below decided that the Commission had the *power* to award refunds but expressly held, contrary to New York's assertion,

[5] More recently the Commission has commenced proceedings in *H. L. Hawkins & H. L. Hawkins, Jr. Operator, et al* Docket Nos. G-18077 et al (40 consolidated producer applications), *Sinclair Oil & Gas Company et al*, Docket Nos. G-16760 et al (49 consolidated producer applications) and *Turnbull & Zoch Drilling Co. (Operator), et al*, Docket Nos. G-17960, et al, (69 consolidated producer applications) which involve the power of the Commission to require producers to refund amounts previously collected pursuant to temporary certificates.

[6] This uncertainty is reflected in the orders under review where the Commission originally held that there was no basis for ordering refunds. However, on rehearing the Commission reached the same result but on the ground that it would be inequitable to order refunds.

that the exercise of this power is not mandatory 329 F. 2d at 250 Petitioner seeks review of the decision as to the Commission's power to award refunds. New York did not seek certiorari, but now attempts to expand the question presented to include its rejected argument that the Commission has the *duty* to award refunds. This is nothing more than a belated attempt by New York to seek certiorari, and accordingly should be denied. Likewise, its request that the Commission is designated an intervenor-petitioner should be denied.[7]

4.

In the landmark *CATCO*[8] case this Court had its *only* opportunity to consider evidence (or lack thereof) presented by producers in a certificate proceeding to support their initial contract prices. Now approximately five years later the producers, Commission, and consumer representatives are still in substantial disagreement as to what the Court intended in *CATCO* insofar as the quality and quantity of evidence to be considered in determining whether a proposed initial contract price is consistent with the public convenience and necessity. The instant appeal aptly illustrates the divergent interpretations of *CATCO* on this point.

Prado submits that *CATCO* clearly indicates that evidence other than what others are receiving for their gas in the area, if available and relevant, should be introduced and considered (Pet. pp. 10-12). Both the Commission and

[7] New York errs in its contention that the Commission has been aligned with Petitioner on the refund issue. (Br. p. 7). It is Petitioner's position that the Commission is without statutory power to award refunds, while the Commission claims that it has the discretionary power to award or deny refunds. Clearly, the Commission's position is adverse to Petitioner's.

[8] *Atlantic Ref. Co.* v. *Public Serv. Com'n.*, 360 U.S. 378 (1959).

New York construe *CATCO* to mean that cost and financial evidence should not be considered but the rationale each follows to reach this desired result is contradictory. The Commission would isolate and confine *CATCO* so that it would mean that evidence of relative production costs, etc., is appropriate only when considering a new production area from which a "line" could not be established because no other sales have been made (Br. p. 14). On the other hand, New York argues that in *CATCO* the Court "searched the record for supporting cost data" because the Commission "had unconditionally certificated an out-of-line price" (Br. p. 8). The inconsistency with the Commission's interpretation of *CATCO* is readily apparent. How could the *CATCO* price be "out-of-line" if, as the Commission states, the sales were from "an area in which no price line had yet been established"? These inconsistent interpretations of *CATCO* simply reinforce Petitioner's plea for clarification of the evidentiary standards to be used in Section 7 certificate cases.

CONCLUSION

The briefs filed by the Commission, New York and Long Island Lighting, et al confirm the need for review by this Court of the decision below and the underlying orders of the Commission. Accordingly, certiorari should be granted.

Respectfully submitted.

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